IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 419

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

E. C. ATKINS AND COMPANY,

Respondent.

PETITION FOR STAY OF MANDATE.

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vs.

E. C. ATKINS AND COMPANY,
Respondent.

PETITION FOR STAY OF MANDATE.

The Respondent, E. C. Atkins and Company, respectfully prays that this Court stay the issuance of its mandate in this case from June 13, 1947 until the "Petition for Rehearing of Respondent, E. C. Atkins and Company," filed contemporaneously herewith, is finally disposed of by this Court. As ground for this Petition Respondent respectfully shows the Court the following:

1. Pursuant to Rule 34 of the Rules of this Court the mandate in this case will issue as of course after June 13, 1947, which is twenty-five days from May 19, 1947, the day upon which the judgment herein was entered.

2. That Respondent contemporaneously herewith is filing with this Court a "Petition for Rehearing of Respondent, E. C. Atkins and Company."

3. That this Petition for Stay of Mandate, like the Petition for Rehearing, is presented in good faith and not for delay.

Respectfully,

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SUPREME COURT OF THE UNITED STATES

No. 418.—October Term, 1946.

National Labor Relations Board, Petitioner, v. Jones & Laughlin Steel Corporation.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[May 19, 1947.]

Mr. Justice Murphy delivered the opinion of the Court.

Like *Labor Board* v. *Atkins & Co.*, *ante*, p. —, this case involves the rights of militarized plant guards under the National Labor Relations Act, 29 U. S. C. § 151 *et seq.* But certain problems are raised here which are not present in the *Atkins* case.

Respondent owns and operates several large steel manufacturing works and was engaged in the production of war materials during the recent war. At respondent's Otis Works at Cleveland, Ohio, about 4,700 individuals are employed. Production and maintenance employees constitute the great bulk of these workers. But there is also included in the total a group of guards and watchmen, numbering about sixty men normally.

A union affiliated with the United Steelworkers of America, C. I. O., has been the exclusive bargaining agent for the production and maintenance employees. Under a contract made with respondent late in 1942, this union disclaimed any representation of "Foremen or Assistant Foremen in charge of any classes of labor, watchmen, salaried employees and nurses." On March 15, 1943, this union filed a petition for investigation and certification of representatives pursuant to § 9 (c) of the Act, in which it sought to be certified as the collective bargaining rep-

resentative of the guard force. A hearing was then held. Respondent claimed that a unit composed of these guards was inappropriate because they "perform certain assigned work that is strictly representative of management." Respondent also claimed that any allegation by the union that a unit including watchmen is appropriate was "a direct contravention" of the 1942 contract. And it was further alleged that any unionization of watchmen or guards was particularly inappropriate during a time of war, that their duties "do not differ greatly from the duties performed by members of a city, county or state police force" and that these guards had been sworn in as auxiliary military police of the United States Army.

The testimony at the hearing showed that there were currently 72 plant protection employees. Of these, 58 were patrolmen whose sole duty was to protect and guard the Otis Works; there were 2 firemen to maintain the fire equipment; 2 dump laborers were assigned to work at a refuse dump while watching that section of the plant; and there were 8 lieutenants and 2 fire captains supervising the others. All of them were carried on respondent's payroll and were under respondent's control as to pay, benefits and conditions of employment. And, as respondent had alleged, they had been sworn in as civilian auxiliaries to the military police of the United States Army, in the same manner and under the same conditions as detailed in the *Atkins* case.

On May 3, 1943, the Board issued its decision and direction of election. 49 N. L. R. B. 390. It found that "all patrolmen, watchmen, and firemen, including dump laborers, employed by the Company at its Otis Works, but excluding lieutenants, captains and supervisors" constituted an appropriate unit and that an election should be held by the employees in this unit to determine if they desired to be represented by the Steelworkers union. It rejected all of respondent's contentions, pointing out

among other things that the union, while representing production and maintenance employees, intended to bargain for the plant guards and watchmen as a separate unit.

The election resulted in the selection of the Steelworkers union as the bargaining representative of the unit in question. The union was certified as the exclusive representative of the unit, respondent refused to bargain with the union and the Board issued its complaint based upon that refusal. On December 2, 1943, the Board reaffirmed the appropriateness of the unit and found that respondent had committed unfair labor practices in refusing to bargain. The usual order was entered. 53 N. L. R. B. 1046.

The Sixth Circuit Court of Appeals denied the Board's petition for a decree enforcing its order. 146 F. 2d 718. While upholding the Board's determination that the militarized guard forces were employees within the meaning of the National Labor Relations Act, the court felt that the unit selected for bargaining purposes was inappropriate and reflected a disregard by the Board of the national welfare. In the eyes of that court, the Board's fatal error was its authorizing the militarized guards to join the same union which represented the production and maintenance employees because "when they were inducted into the Unions and became subject to their orders, rules and decisions, the plant protection employees assumed obligations to the Unions and their fellow workers, which might well in given circumstances bring them in conflict with their obligation to their employers, and with their paramount duty as militarized police of the United States Government." 146 F. 2d at 722.

The Board filed a petition in this Court for a writ of certiorari. As in the *Atkins* case, the Board pointed out that the plant protection employees had been demilitarized at a date (May 29, 1944) subsequent to the re-

fusals to bargain, but urged that this fact did not make the case moot. We granted the writ of certiorari at the same time as we granted the writ in the *Atkins* case, vacated the judgment below and remanded the cause to the Circuit Court of Appeals "for further consideration of the alleged changed circumstances with respect to the demilitarization of the employees involved, and the effect thereof on the Board's orders." 325 U. S. 838.

The Board and the respondent then entered into a stipulation relative to the dates and circumstances of the demilitarization of the guards. From this stipulation it appeared that the qualifications, strength, functions and duties of the guards continued to be the same after demilitarization as before. Also included in the stipulation were facts showing that both before and after the period of militarization, August 5, 1942, to May 29, 1944, the guards were commissioned, sworn and bonded as private policemen of the City of Cleveland and exercised "the legal powers of peace officers in their work as plant guards." It was further stipulated that because of "the magnitude and other characteristics of the Otis Works, its police protection by the ordinary police of the City of Cleveland is not practical or feasible; and, as a result, for a great many years, the police protection of the Works and the enforcement of law, peace and good order therein has been delegated wholly to the plant guard force. For similar reasons, the work of preventing and extinguishing fires has been in large part the responsibility of the guard force, rather than that of the municipal fire department."

The Board filed a motion in the Circuit Court of Appeals for a decree enforcing its order. That court denied the motion and held that the facts concerning both the demilitarization and the deputization were to be considered as though they had been presented at the hearing before the Board; on that basis, the court reaffirmed its belief that the guards were employees within the meaning

of the Act, but concluded that in view of the "drastic police powers" exercised by the guards, it was "improper for the Board to permit their organization by the same union which represents the production employees." 154 F. 2d 932.

Our decision in the *Atkins* case makes clear that the demilitarization of the guards did not render this case moot. The order was a continuing command which may be effectuated in the future. But unless the order was valid when it was issued, there is no basis whatever for it and no court can decree its enforcement in the future. Hence its validity must be judged as of the time when it was issued, a time when the guards were still militarized. This is not to say, however, that events subsequent to demilitarization are irrelevant in deciding whether the order should be enforced. All that we hold is that demilitarization in and of itself is not enough to render the order or the case moot.

The *Atkins* decision likewise disposes of any issues relating to the effect of militarization upon the status of the guards as employees within the meaning of § 2 (3) of the National Labor Relations Act. To that extent, the Board's order here was plainly valid. Unanswered by the *Atkins* decision, however, is the question whether the militarization of the plant guards precluded the Board from grouping the guards in a separate unit and permitting them to choose as their bargaining representative a union which also represented production and maintenance employees. To that issue, which is the primary one raised by this case, we now turn.

The Board, of course, has wide discretion in performing its statutory function under § 9 (b) of deciding "the unit appropriate for the purposes of collective bargaining." *Pittsburgh Plate Glass Co.* v. *Labor Board*, 313 U. S. 146. It likewise has discretion to place appropriate limitations on the choice of bargaining representatives should it find

that public or statutory policies so dictate. Its determinations in these respects are binding upon reviewing courts if grounded in reasonableness. *May Stores Co.* v. *Labor Board*, 326 U. S. 376, 380. A proper determination as to any of these matters, of course, necessarily implies that the Board has given due consideration to all the relevant factors and that it has correlated the policies of the Act with whatever public or private interests may allegedly or actually be in conflict.

Thus, in determining the proper unit for militarized guards and in deciding whether they should be permitted to choose the same union that represents production and maintenance employees, the Board must be guided not alone by the wishes of the guards or the union or by what is appropriate in the case of non-militarized guards. It must also give due consideration to the military duties and obligations of the guards and their possible relationships to a union representing other employees; it must consider what limitations, if any, on the normal freedom to choose whatever representative the guards may desire are necessitated by the war effort.

It is clear that the Board has given these matters due consideration. It has not acted in this case in disregard of the national welfare. Sanctioning the creation of a separate unit of respondent's guards and permitting them to select a union of their own choosing, a union which happened to be the representative of the production and maintenance employees, are indicative of a considered, mature judgment on the Board's part. The problem has been raised in many cases before the Board and its conclusion is in accord with that reached by the War Department.

In *Chrysler Corp.*, 44 N. L. R. B. 881, *Dravo Corp.*, 52 N. L. R. B. 322, and *Armour and Co.*, 63 N. L. R. B. 1200, the Board has spelled out the various considerations that have led it to adopt the policy applied in this case. Those

cases reveal the Board's belief that freedom to choose a bargaining agent includes the right to select an agent which represents other employees in a different bargaining unit. This principle may safely be applied to militarized guards, in the Board's opinion, since the collective bargaining process is flexible enough to allow for the increased responsibilities placed upon the militarized guards. And the Board has concluded that the remedy for inefficiency or wilful disregard or neglect of duty on the part of such guards lies in the power of the employer to discipline or discharge them and in the power of the military authorities to take whatever steps may be necessary to protect the public interest. Moreover, the Board has discovered no serious question as to any conflict between loyalties to the Army and to the union, the Board finding no basis to assume that membership in a union tends to undermine the patriotism of militarized guards or that loyalty to the United States would be secondary in their minds to loyalty to the union. But one restriction is placed upon the statutory freedom of the militarized guards. The Board insists that they be placed in separate bargaining units so that they may be better able to function within the military sphere and so that the military authorities may be able to exercise greater control over them.

This policy of the Board coincides with that expressed in the regulations of the War Department. As we pointed out in the *Atkins* case, *ante*, p. —, the military authorities have given full sanction to collective bargaining on the part of militarized guards, provided only that such action does not interfere with their military obligations. Paragraph 6h (2) of Circular No. 15, issued on March 17, 1943, by Headquarters, Army Service Forces, acknowledges with approval the Board's policy of permitting militarized guards to be represented in collective bargaining with the management by a bargaining unit other than

that composed of the production and maintenance workers, even though both bargaining units may be affiliated with the same labor organization. A clarifying memorandum of the War Department, dated July 10, 1943, reiterates the War Department attitude still further: "In the event that plant guards enrolled as Auxiliary Military Police desire to be represented in collective bargaining with the management, they should be represented by a bargaining unit other than that representing the production and maintenance workers. However, in such event, both bargaining units may be affiliated with the same trade-union local, provided they are, in fact, separate bargaining units."

We are unable to say that the policy formulated by the Board is without reason. When the employer retains unfettered power to fix the wages, hours or other working conditions of militarized guards, the guards stand in the same relation to the employer regarding those matters as do production and maintenance employees. In disputes with the employer over those matters, they suffer from the same inequality of bargaining power as suffered by other unorganized employees; the appropriateness and need of collective bargaining on their part through freely chosen representatives are equally as great. But to prevent them from choosing a union which also represents production and maintenance employees is to make the collective bargaining rights of the guards distinctly second-class. Such a union may be the only one willing and able to deal with the employer. Its experience and acquaintance with the employer and the plant may make it specially qualified to bargain for the guards. The guards might thus be deprived of effective bargaining rights if they are denied the right to choose such a union. Freedom to choose, in this statutory setting, must mean complete freedom to choose any quali-

fied representative unless limited by a valid contrary policy adopted by the Board.

After deliberation, the Board has concluded that this freedom can safely be recognized to the fullest extent as to militarized guards, provided only that they be placed in separate bargaining units. We cannot say that this conclusion is one so lacking in an appreciation of the military necessities of the situation that we should voice our disapproval and substitute our own views of public policy. It is significant that the Board, in weighing the military requirements against the normal policies of the Act, has arrived at a result which coincides with that reached by the War Department. The latter agency has been satisfied that militarized guards can safely join and choose unions representing other employees without impairing their loyalty to the United States or their ability to perform their military duties satisfactorily. We assume that attitude was adopted after a full consideration of all the military necessities, matters which are peculiarly within the competence and knowledge of the War Department. In light of that fact, it is impossible to say that a civilian agency erred in failing to insist upon what the military experts found to be unnecessary. To prohibit militarized guards from joining or choosing unions representing production and maintenance workers on grounds of military necessity is to erect limitations which not even those most familiar with the military situation thought essential or desirable. And in this nation, the statutory rights of citizens are not to be readily cut down on pleas of military necessity, especially pleas that are unsupported by military authorities. Certainly it would take more than the speculation and theories advanced by the court below to undermine the foundation of the policy adopted in this respect by the Board.

Moreover, the experience of the Board has revealed none of the dire consequences which the court below feared

might flow from the application of the policy in question. 146 F. 2d at 722–723. In its brief before us, the Board has stated that it has certified bargaining representatives for units of militarized guards in more than 105 cases; in more than 80 of these cases the certified union also represented a separate bargaining unit of other employees of the same employer. Employer recognition of the unions, collective bargaining and contractual relations have resulted in many instances. Yet the Board states that it has received "no indication from any source that the dangers to the public interest and particularly to the war effort which the courts below thought to inhere in that policy have in fact materialized in any case."

One final matter remains. After the Board's order was issued and after the guards at respondent's Otis Works were demilitarized, the guards were deputized by the police authorities of the City of Cleveland. The Board claims that since this matter was not raised before it, the court below was precluded by § 10 (e) of the Act from considering the effect of the deputization upon the propriety of enforcing the Board's order. *Labor Board* v. *Newport News Co.*, 308 U. S. 241, 249–250; *Marshall Field & Co.* v. *Labor Board*, 318 U. S. 253; *Labor Board* v. *Cheney Lumber Co.*, 327 U. S. 385.

But the provision of § 10 (e), that "No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances," quite obviously refers to objections that might have been but were not raised in the original proceeding before the Board. In this case, however, the deputization of the guards occurred after the Board had concluded its hearing and issued its order and after the court below had refused the first time to enforce the order. It was thus a matter which could not have been raised before the Board. And the failure

of respondent to raise the then non-existent issue before the Board could not deprive the court below of power to consider the issue once it did come into existence. See *Labor Board v. Blanton Co.*, 121 F. 2d 564, 571.

When circumstances do arise after the Board's order has been issued which may affect the propriety of enforcement of the order, the reviewing court has discretion to decide the matter itself or to remand it to the Board for further consideration. For example, where the order obviously has become moot, the court can deny enforcement without further ado; but where the matter is one involving complicated or disputed facts or questions of statutory policy, a remand to the Board is ordinarily in order. In this case, however, the Board and the respondent have stipulated the facts concerning the deputization of the guards. The only issue is whether the deputization is so inconsistent with the policies of the Act that the statutory guarantees must be denied to the guards and the enforcement of the Board's order refused. That issue is one normally to be determined by the Board in the first instance, it being the function of the Board rather than the courts initially to correlate the policies of the Act with conflicting interests. But we do not believe that a remand is necessary under the special circumstances of this case.

The Board has frequently considered the status of plant guards who have been deputized as deputy sheriffs or special police. Where the private employer retains the right to fix the wages, hours or other working conditions of such guards, the Board's uniform conclusion has been that they are employees of the private employer and that they retain their rights under the National Labor Relations Act. See, *e. g.*, *Luckenbach Steamship Co.*, 2 N. L. R. B. 181, 189; *American-Hawaiian Steamship Co.*, 10 N. L. R. B. 1355, 1363-1364; *American Brass Co.*, 41 N. L. R. B. 783, 785; *Bethlehem-Fairfield Shipyard, Inc.*,

61 N. L. R. B. 901, 905–906; *Standard Steel Spring Co.*, 62 N. L. R. B. 660, 662–663. As in the case of militarized guards, the Board has found no evidence that when deputized guards join unions or engage in collective bargaining through freely chosen representatives their honesty, their loyalty to police authorities, or their competence to execute their police duties satisfactorily is undermined. It is sufficient, in the Board's judgment, to protect the special status of these guards by segregating them in separate bargaining units.

We find it impossible to say that the Board is wrong in adopting this policy as to deputized guards. It is a common practice in this country for private watchmen or guards to be vested with the powers of policemen, sheriffs or peace officers to protect the private property of their private employers. And when they are performing their police functions, they are acting as public officers and assume all the powers and liabilities attaching thereto. *Thornton* v. *Missouri Pacific R. Co.*, 42 Mo. App. 58; *Dempsey* v. *New York Central & Hudson River R. Co.*, 146 N. Y. 290, 40 N. E. 867; *McKain* v. *Baltimore & Ohio R. Co.*, 65 W. Va. 233, 64 S. E. 18; *Neallus* v. *Hutchinson Amusement Co.*, 126 Me. 469, 139 A. 671. But it has never been assumed that such deputized guards thereby cease to be employees of the company concerned or that they become municipal employees for all purposes. See *Chicago & N. W. R. Co.* v. *McKenna*, 74 F. 2d 155. Wages, hours, benefits and various other conditions of work normally remain subject to determination by the private employers. At least as to those matters, the deputized guards remain employees of the private employers. See *Walling* v. *Merchants Police Service*, 59 F. Supp. 873. Hence they may be held to be employees within the meaning of § 2 (3) of the National Labor Relations Act. *Labor Board* v. *Hearst Publications*, 322 U. S. 111.

Deputized guards bear the same relationship to management that non-deputized guards bear, a relationship that we discussed in the *Atkins* case, *ante*, p. —, and that we found to be adequate for the Board to find the existence of an employer-employee status. Likewise, their relationship to police or municipal authorities is not one that is necessarily inconsistent with their status as employees under the Act. Union membership and collective bargaining are capable of being molded to fit the special responsibilities of deputized plant guards and we cannot assume, as a proposition of law, that they will not be so molded. If there is any danger that particular deputized guards may not faithfully perform their obligations to the public, the remedy is to be found other than in the wholesale denial to all deputized guards of their statutory right to join unions and to choose freely their bargaining agents. The state and municipal authorities, in short, have adequate means of punishing infidelity and assuring full police protection.

We find nothing in the instant case which would make inapplicable the Board's policy with respect to deputized guards, and the Board has so argued before us. The stipulated facts reveal that the guards at respondent's Otis Works were commissioned as private policemen of the City of Cleveland under § 188 of the Cleveland Municipal Code (1924), and as such are members of the municipal police force and exercise the legal powers of peace officers in their work as plant guards. They are under the control of a police captain and his lieutenants, the police captain being directly responsible to respondent's director of plant security at Pittsburgh and to respondent's executive officer in general charge of the Otis Works. The police captain is also a deputy sheriff of Cuyahoga County, Ohio. It is not denied that the guards continue to be paid by respondent and that their hours, benefits and other conditions of work remain the responsibility of respondent.

The court below pointed out that the Ohio law on the status and duties of special policemen is in accord with the general rule which we have noted. In other words, special policemen are public officers when performing their public duties. *New York, Chicago & St. Louis R. Co.* v. *Fieback*, 87 Ohio St. 254, 100 N. E. 889; *Pennsylvania R. Co.* v. *Deal*, 116 Ohio St. 408, 156 N. E. 502. But none of the Ohio cases attempts to say that the public status of special policemen destroys completely their private status as employees of individual companies. Nor is there any basis for the intimation that their public duties are such as to render incompatible the recognition of rights under the National Labor Relations Act.

We therefore conclude that the facts and the law are sufficiently clear to justify a determination that the guards at respondent's Otis Works are employees within the meaning of the Act despite their deputization as municipal policemen. And they have as much right to select as their bargaining agent a union which represents production and maintenance workers as have militarized guards, the same considerations being applicable. It is obvious that the Board would apply such a policy to this case, thereby making a remand to the Board a mere formality and a needless addition to an already over-prolonged proceeding. Under such circumstances, a remand to the Board is unnecessary.

It follows that the court below should have enforced the Board's order.

Reversed.

THE CHIEF JUSTICE, MR. JUSTICE FRANKFURTER, MR. JUSTICE JACKSON and MR. JUSTICE BURTON dissent substantially for the reasons set forth in the opinion of the court below, 154 F. 2d 932.

SUPREME COURT OF THE UNITED STATES

No. 419.—October Term, 1946.

National Labor Relations Board, Petitioner, v. E. C. Atkins and Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[May 19, 1947.]

Mr. Justice Murphy delivered the opinion of the Court.

The problem posed by this case is whether private plant guards, who are required to be civilian auxiliaries to the military police of the United States Army, are employees within the meaning of § 2 (3) of the National Labor Relations Act, 29 U. S. C. § 152 (3).

At all material times, the respondent corporation was engaged in the manufacture of saws, tools and armor plate. It employed more than 1,200 production and maintenance employees at its two plants at Indianapolis, Indiana. Before it began to produce armor plate for defense and war purposes, respondent employed about six watchmen or guards. When it entered upon war production, however, the War Department required that an auxiliary military police force of sixty-four members be established to guard the plants.

In 1943, after the necessary additional guards had been recruited, a union [1] petitioned the National Labor Relations Board for investigation and certification of representatives pursuant to § 9 (c) of the Act. It was alleged

[1] Local 1683 of the International Association of Machinists, District 90. This union did not represent any of the maintenance or production employees in respondent's plants, but it did admit to membership plant protection employees of other employers as well as those of respondent.

that the union represented the sixty-four plant guards employed by respondent at its two plants. The respondent moved to dismiss the petition on the ground that it was not the employer of the guards within the meaning of § 2 (2) and that the guards were not employees as defined by § 2 (3). A hearing was thereupon held and evidence concerning the status of the guards was introduced.

On October 19, 1943, the Board concluded from the evidence thus submitted that these plant guards were employees within the meaning of § 2 (3) despite their status as civilian auxiliaries to the military police. 52 N. L. R. B. 1470. It held that all the plant guards at respondent's two plants, excluding the chief guards, lieutenants and all other supervisory employees with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action, constituted a unit appropriate for collective bargaining. An election was therefore directed to be held, which resulted in the union in question being chosen as bargaining representative. The union was certified by the Board as the exclusive representative of the plant guards.

Subsequently, the union filed charges that the respondent had refused to bargain collectively. A complaint was issued by the Board, followed by a hearing at which evidence regarding that refusal was introduced. The Board, on May 30, 1944, issued its decision in which it concluded that the guards were employees of respondent and that the latter had committed unfair labor practices in refusing to bargain with the union. 56 N. L. R. B. 1056.

The Board accordingly issued an order requiring respondent to cease and desist from refusing to bargain collectively with the union, and commanding it to bargain with the union, upon request, in respect to rates of pay, wages, hours of employment and other conditions of em-

ployment. The Seventh Circuit Court of Appeals declined to enforce the Board's order, holding (1) that the guards were not employees of the respondent within the meaning of § 2 (3) of the Act since they were militarized, and (2) that even if the militarized guards were to be considered as employees of respondent, enforcement of the Board's order should not be allowed because to do so would be or would likely be inimical to the public welfare. 147 F. 2d 730.

In filing a petition in this Court for a writ of certiorari, the Board noted that the guard forces at respondent's plants had been demilitarized early in 1944, but urged that the case was not thereby rendered moot. We granted certiorari, vacated the judgment below and remanded the case to the Circuit Court of Appeals "for further consideration of the alleged changed circumstances with respect to the demilitarization of the employees involved, and the effect thereof on the Board's orders." 325 U. S. 838.

The Board and the respondent entered into a stipulation relative to the dates and circumstances of the demilitarization of the guards. The stipulation noted that most of the guards had been released from service and that only eleven of them had been retained as watchmen by respondent as of February 23, 1946; and those eleven had been "sworn in as Deputy Policemen by the City of Indianapolis." The Board then filed a motion in the Circuit Court of Appeals for a decree enforcing its order. This motion was denied and the prior holding was reaffirmed, the court stating that the demilitarization was irrelevant to the issue of whether the plant guards were employees at the time when the respondent refused to bargain with the union. 155 F. 2d 567. The importance of the problem raised by the case, together with a conflict over the answer to this problem between the court below and the Sixth Circuit Court of Appeals, *Labor Board* v.

Jones & Laughlin Steel Corp., 146 F. 2d 718, prompted us to grant a further review of the case.

We agree with the Circuit Court of Appeals that the demilitarization of the guards did not render the case moot and that it had no effect upon the prime issue in the case. The Board's order was based upon a holding that the respondent committed an unfair labor practice by refusing to recognize and bargain with the union selected by the militarized guards. And that refusal occured at a time when the guards were still militarized. A determination that the respondent had a statutory duty to bargain with the union at that time is therefore essential to the validity of the Board's order. The fact that the guards were subsequently demilitarized did not affect their status as employees at this crucial juncture; nor did it relieve respondent of any duty to bargain that it might otherwise have had at that point.

The Board's order, moreover, was a continuing direction to bargain collectively with the union designated by the guards. Demilitarization has not dispensed with whatever duty respondent may have now or in the future to comply with that order. If the guards were employees of respondent entitled to the benefits of the Act during the period of militarization, *d fortiori* they are employees now that all connections with the Army have been severed; and their statutory rights continue to be entitled to full respect. Respondent's guard force still remains in existence, although considerably reduced in size, and the union presumably continues to be the representative of the guards. Under such circumstances, the case is not moot. *Labor Board* v. *Greyhound Lines*, 303 U. S. 261, 271; *J. I. Case Co.* v. *Labor Board*, 321 U. S. 332, 334. See also *Federal Trade Commission* v. *Goodyear Co.*, 304 U. S. 257, 260.

As to the merits, it is elementary that the Board has the duty of determining in the first instance who is an em-

ployee for purposes of the National Labor Relations Act and that the Board's determination must be accepted by reviewing courts if it has a reasonable basis in the evidence and is not inconsistent with the law. *Labor Board* v. *Hearst Publications*, 322 U. S. 111. Realizing that labor disputes and industrial strife are not confined to those who fall within ordinary legal classifications, Congress has not attempted to spell out a detailed or rigid definition of an employee or of an employer. The relevant portion of § 2 (3) simply provides that "The term 'employee' shall include any employee, . . ." In contrast, § 2 (2) states that "The term 'employer' includes any person acting in the interest of an employer, directly or indirectly, . . ." As we recognized in the *Hearst* case, the terms "employee" and "employer" in this statute carry with them more than the technical and traditional common law definitions. They also draw substance from the policy and purposes of the Act, the circumstances and background of particular employment relationships, and all the hard facts of industrial life.

And so the Board, in performing its delegated function of defining and applying these terms, must bring to its task an appreciation of economic realities, as well as a recognition of the aims which Congress sought to achieve by this statute. This does not mean that it should disregard the technical and traditional concepts of "employee" and "employer." But it is not confined to those concepts. It is free to take account of the more relevant economic and statutory considerations. And a determination by the Board based in whole or in part upon those considerations is entitled to great respect by a reviewing court, due to the Board's familiarity with the problems and its experience in the administration of the Act.

Laying aside for the moment the matter of militarization, we cannot say in this case that the Board would be legally unjustified in holding that the rank and file plant

guards are employees within the meaning of the Act. They bear essentially the same relation to management as maintenance and production employees. In fact, they are indistinguishable from ordinary watchmen, gatemen, patrolmen, firemen and guards—persons who have universally been regarded and treated as employees for purposes of union membership and employee benefits. They perform such duties as inspecting persons, packages and vehicles, carrying cash to various parts of the plant, and generally surveying the premises to detect fires, suspicious circumstances and sabotage. Moreover, the guards in question are not supervisors; they possess no power to affect the working conditions of other employees. Without collective bargaining, they are subject to the unilateral determination by the employer of their wages, hours, seniority, tenure and other conditions of work. Individually, they suffer from inequality of bargaining power and their need for collective action parallels that of other employees. From any economic or statutory standpoint, the Board would be warranted in treating them as employees. Even under conventional standards, they are controlled by management to an extent sufficient to justify designating them as employees.

Nor can we say, as a matter of law, that permitting plant guards to be considered as employees entitled to the benefits of the Act would make them any less loyal to their employer in carrying out their designated tasks. In guarding the plant and personnel against physical danger, they represent the management's legitimate interest in plant protection. But that function is not necessarily inconsistent with organizing and bargaining with the employer on matters affecting their own wages, hours and working conditions. They do not lose the right to serve themselves in these respects merely because in other respects they represent a separate and independent interest of management. As in the case of foremen, we see no

basis in the Act whatever for denying plant guards the benefits of the statute when they take collective action to protect their collective interests. *Packard Motor Car Co. v. Labor Board*, 330 U. S. —.

We cannot assume, moreover, that labor organizations will make demands upon plant guard members or extract concessions from employers so as to decrease the loyalty and efficiency of the guards in the performance of their obligations to the employers. There is always that possibility, but it does not qualify as a legal basis for taking away from the guards all their statutory rights. In other words, unionism and collective bargaining are capable of adjustments to accommodate the special functions of plant guards.

The crucial problem in this case, however, is whether the militarization of the plant guards changed their status as employees as a matter of law so as to prohibit the Board from extending to them the benefits of the Act which they would otherwise have. The short answer to that problem is that militarization as such does not necessarily change the status of plant guards. It may or may not bring about a change, depending upon the particular circumstances. The militarization may be a qualified one; the employer may retain power to fix wages, hours and other conditions of work; the need and desirability for collective action on the part of the guards may exist as to the matters over which the employer retains control; and a recognition of the statutory rights of the guards may be entirely consistent with their military obligations. If that is the case, the guards remain employees for purposes of the Act. But if the militarization is such as to transfer to the Army all the matters over which the employer would normally have control, matters which would form the basis for collective bargaining as contemplated by the Act, the guards may lose their status as private employees within the purview of the statute.

The Board's determination that the militarization of the guards in respondent's plants was of a type that did not alter their status as employees under the Act must therefore be tested by the applicable War Department regulations and by the evidence introduced at the hearing before the Board. If such a result is consistent with the regulations and has a reasonable basis in the other evidence, the Board's order must be sustained.

The plant guards in this case were enrolled as civilian auxiliaries to the military police under War Department regulations issued pursuant to Executive Order No. 8972, dated December 12, 1941. That order authorized the Secretary of War to establish and maintain military guards and patrols, and to take other appropriate measures, to protect certain strategic premises, materials and utilities from injury and destruction. The Secretary of War accordingly directed the military organization of plant guard forces as auxiliary military police at plants important to the prosecution of the war, the directive to that effect being issued by the Adjutant General on July 2, 1942. Supplementary regulations were contained in Circular No. 15, issued on March 17, 1943, by Headquarters, Army Service Forces.[2]

As stated by these regulations, the purpose of the military organization of the plant guards was "to increase the authority, efficiency, and responsibility of guard forces at plants important to the prosecution of the war, and through military training to provide auxiliary forces throughout the United States to supplement the Army in wartime emergency situations."[3] It was made clear,

[2] Circular No. 15 was not introduced into evidence in the proceeding before the Board. But it was issued by military authorities pursuant to the power vested in the Secretary of War by Executive Order No. 8972 and we may take judicial notice of it. *Standard Oil Co.* v. *Johnson*, 316 U. S. 481, 483–484.

[3] Circular No. 15, par. 1a.

however, that plant managements were not relieved of their responsibility "for providing adequate protection at all times against all hazards."[4] In other words, employers who wished to obtain government contracts for the production of war materials were required to provide "adequate protection" for their plants where the material was to be produced; if the existing plant protection forces were inadequate, additional guards were to be recruited by the employers. But all the original and additional guards were to be enrolled as civilian auxiliaries to the military police.

The military authorities reserved the right to veto the hiring or firing of any plant guard where such action by the employer might impair the efficiency of the guard force.[5] And the military plant guard officers were authorized to take appropriate action "through the plant management" to correct conditions which might result in "defective or inadequate performance by the guard forces of its ordinary protective duties."[6]

The functions of these civilian auxiliaries to the military police were stated to be twofold: "(1) To provide internal and external protection of the plant against sabotage, espionage, and natural hazards. (2) To serve with the Army in providing protection to the plant and its environs in emergency situations."[7] They were subject to call for military service even where emergencies arose at places other than the plants where they normally worked. To these ends, military plant guard officers were authorized to exercise direct control over the guard forces "only in matters relating to military instruction and duties as Auxiliary Military Police."[8] But such orders "will be issued only after consultation with and, if possible, con-

[4] *Id.* par. 1b.
[5] *Id.* par. 6b (2).
[6] *Id.* par. 1b.
[7] *Id.* par. 2a.
[8] *Id.* par. 5a (2).

currence by the plant management. . . . Control, therefore, will be exercised as heretofore through the plant management except at drill and except in emergency situations. Although the plant guard officers will be in command at all times, *they will not supplant the civilian guard officers,* and unless expediency demands otherwise will exercise their authority through the chain of command established by the plant management."[9] The regulations also provided that the military drill of the guard forces should not exceed one hour per week "except with the approval of the plant management."[10]

As to the employer's relations with the guard force, the regulations were explicit in recognizing that those relations remained essentially the same as if there were no militarization. According to Circular No. 15: "Basically, the militarization of plant guard forces does not change the existing systems of hiring, compensation, and dismissal; all remain primarily a matter between the guards and the plant managements. Guards in the employ of a private employer may, as heretofore, be dismissed by that employer."[11] A veto power over employment and dismissal, of course, was retained by the military. It was further provided: "The status of the employer in respect to the employee benefits for the guard force is not changed. For example, social security, workmen's compensation, and employer's liability provisions remain unaffected."[12] And the employer was expected to train the guard forces in their ordinary protective duties and was required to furnish them with uniforms and weapons.[13]

[9] *Id.* pars. 5c (2) and 6a (1).

[10] *Id.* par. 7g (1).

[11] *Id.* par. 6b (1).

[12] *Id.* par. 6f.

[13] The guards were required to salute Army officers and had the right to arrest anyone in the plants. They carried identification cards issued by the War Department and wore arm bands on which appeared the words "Auxiliary Military Police." *Id.* par. 7.

The right of the plant guards to bargain collectively was recognized by Circular No. 15, paragraph 6h (2) of which provided: "Auxiliary Military Police are permitted to bargain collectively, but no such activity will be tolerated which will interfere with their obligations as members of the Auxiliary Military Police. In view of recent decisions by the National Labor Relations Board (see In re Lord Mfg. Co. & United Rubber Workers of America, CIO, Case No. R-4826, February 1943) [*Lord Manufacturing Co.*, 47 N. L. R. B. 1032], the Auxiliary Military Police should be represented in collective bargaining with the management by a bargaining unit other than that composed of the production and maintenance workers, although both bargaining units may be affiliated with the same labor organization. Where the guards are not now included in the same bargaining unit, this is mandatory; where the guards are included in such unit, serious consideration will be given to effect a change to conform to the foregoing policies." Provision was also made that collective bargaining agreements covering plant guards who were civilian auxiliaries should include a clause recognizing that nothing in the collective bargaining relationship should interfere with the duties imposed upon the guards as auxiliary military police.[14]

The guards were required to sign agreements with the United States.[15] Each agreement stated that the individual, who had been or was about to be employed by the particular company as a guard at its plant, agreed that he would support and defend the Constitution, bear true faith and allegiance to the Constitution, and faithfully discharge his duties as a civilian auxiliary to the military

[14] *Id.* par. 6h (1).

[15] If a guard refused to sign this agreement, he might be, but need not be, temporarily retained with the understanding that he would be dismissed as soon as he could be replaced, and in any event within a reasonable time. *Id.* par. 5b (1).

police. He also acknowledged in this agreement that appropriate Articles of War had been read and explained to him and that he was subject to military law during his employment.[16] The applicable regulations then provided that he could be court martialed where no other effective form of punishment would be effective. But "Unlike the court-martial punishment of a person in military service, a court martial cannot punish a member of the Auxiliary Military Police by reduction in military grade or by forfeiture of pay and allowances. Analogous punishments might be imposed, such as reduction in grade in the guard organization or temporary suspension from duty. A fine, as distinguished from forfeiture, is regarded as an appropriate form of punishment." [16] In all other respects, the guards remained subject to the civil courts.

The evidence and testimony submitted to the Board confirmed the fact that the plant guards in respondent's two plants were militarized in accordance with the foregoing regulations. The guards at each plant were under the direct supervision of a chief guard and several lieutenants—all of whom were civilians recruited by the respondent like the rank and file guards. The military superior of the chief guards was the District Plant Guard Officer stationed at the Continuous Security District Office of the War Department, Cincinnati, Ohio, an officer who also had charge of guard forces at other plants in the district. A general directive issued by this office repeated many of the provisions of Circular No. 15.[17] It also provided that orders and regulations for the auxiliary military police would be issued in the name of the Chief of the District "after plant management has indicated its concurrence by signing the guard order in the lower left hand corner." But the only guard orders received by the chief guards at re-

[16] *Id.* par. 8d.

[17] This directive, however, omitted par. 6h (2) of Circular No. 15, dealing with the right of guards to bargain collectively.

spondent's plants were three general ones signed by the District Plant Guard Officer, orders that were applicable to all militarized guards in the district. All the specific orders that were ever issued emanated from the chief guards. About the only direct contact between the military authorities and these guards occurred during the weekly drill period.

Respondent recruited the necessary additional guards through its ordinary employment channels and it had the power to initiate dismissals from the force. Such actions, however, were subject to the approval of the military. Respondent at all times carried the guards on its regular pay rolls, determined their rate of compensation and paid their wages after making appropriate deductions. And since it did not operate on a cost-plus basis, respondent actually bore the cost of the guards' wages.[18] Respondent did not attempt to give orders to the guards, merely making suggestions to the chief guards. The latter worked in close cooperation with respondent's personnel manager and no friction developed. Respondent delegated to the chief guards its power to determine the guards' working hours and the promotion policies in regard to them. Finally, respondent maintained its liability as to the guards on matters of social security and workmen's compensation and was obliged to obey all minimum wage and maximum hour requirements.

[18] Respondent argues that it was forced to pay the guards because of the War Department's action in requiring additional plant protection. But respondent was not forced to enter into its war production contracts with the Government. It did so voluntarily and with the understanding that it would comply with any terms and conditions the Government saw fit to impose. One of these conditions was that respondent expand its peacetime guard force of six men to a wartime complement of sixty-four. So far as these additional guards being respondent's employees is concerned, it is no different from a requirement that respondent employ more chemists or other production experts to facilitate execution of the contracts.

From the foregoing, an ample basis is evident to support the Board's determination that militarization did not destroy the employee status of the guards in respondent's plants. The War Department regulations and the actual practice in these plants were based upon the explicit assumption that the guards were the private employees of respondent rather than employees or soldiers of the United States. The regulations made it unmistakable that the normal, private employer-employee relationship was to remain substantially intact. Especially clear was the fact that the right of the guards to join unions and to bargain collectively was to be respected. The military authorities took over from respondent only those attributes of control which were necessary to effectuate the rather limited military program, many aspects of that transferred power being exercisable by the Army only in the gravest emergencies.

We cannot say that the Board was without warrant in law or in fact in concluding that respondent retained "a sufficient residual measure of control over the terms and conditions of employment of the guards" so that they might fairly be described as employees of respondent.[19] The most important incidents of the employer-employees relationship—wages, hours and promotion—remained matters to be determined by respondent rather than by the

[19] The Board's conclusion in this respect is confirmed by the results reached under other statutes. Militarized guards have been treated as private employees for purposes of the Fair Labor Standards Act. *Walling v. Lum*, 7 Wage Hour Rep. 570. And they have consistently been treated as such by the National War Labor Board. *Detroit Steel Products Co.*, 6 War Lab. Rep. 495; *Brewster Aeronautical Corp.*, 11 War. Lab. Rep. 286, 15 War Lab. Rep. 239, 240–243; *Great American Industries*, 11 War. Lab. Rep. 287; *Youngstown Sheet & Tube Co.*, 15 War. Lab. Rep. 500, 19 War Lab. Rep. 813; *General Motors Corp.* 18 War Lab. Rep. 541. And see *Labor Board* v. *Carroll*, 120 F. 2d 457.

Army. Respondent could settle those vital matters unilaterally or by agreement with the guards. And the guards were free to negotiate and bargain individually or collectively on these items. It is precisely such a situation to which the National Labor Relations Act is applicable. It is a situation where collective bargaining may be appropriate and where statutory objectives may be achieved despite the limitations imposed by militarization. Under such circumstances, the Board may properly find that an employee status exists for purposes of the Act.

In this setting, it matters not that respondent was deprived of some of the usual powers of an employer, such as the absolute power to hire and fire the guards and the absolute power to control their physical activities in the performance of their service. Those are relevant but not exclusive indicia of an employer-employee relationship under this statute. As we have seen, judgment as to the existence of such a relationship for purposes of this Act must be made with more than the common law concepts in mind. That relationship may spring as readily from the power to determine the wages and hours of another, coupled with the obligation to bear the financial burden of those wages and the receipt of the benefits of the hours worked, as from the absolute power to hire and fire or the power to control all the activities of the worker. In other words, where the conditions of the relation are such that the process of collective bargaining may appropriately be utilized as contemplated by the Act, the necessary relationship may be found to be present. *Labor Board* v. *Hearst Publications, supra*, 129.

The Board's determination that there was a relationship in this case deserving of statutory protection does not reflect an isolated or careless reconciliation of the rights guaranteed by the Act with the important wartime duties of plant protection employees. In the course of

its administration of the Act during the war, the Board was faced with this problem many times.[20] It was well acquainted with the important and complex considerations inherent in the situation. The responsibility of representing the public interest in such matters and of reaching a judgment after giving due weight to all the relevant factors lay primarily with the Board. See *Southern Steamship Co.* v. *Labor Board*, 316 U. S. 31, 47. In the absence of some compelling evidence that the Board has failed to measure up to its responsibility, courts should be reluctant to overturn the considered judgment of the Board and to substitute their own ideas of the public interest. We find no such evidence in this case.

Here we have the Board's considered and consistent judgment that militarized plant guards may safely be permitted to join unions and bargain collectively and that their military duties and obligations do not suffer thereby. In agreement with that viewpoint has been the War Department, the agency most directly concerned with the military aspects of the problem. Its regulations and directives have clearly acknowledged the feasibility of recognizing collective bargaining rights of these guards during wartime, provided only that no encroachment is made upon military necessities. This policy of the Board, moreover, has been confirmed by experience. The Board states that it has certified bargaining representatives for units of militarized guards in more than 105 cases, in none of which has any danger to the public interest or to the war effort resulted.

Under such circumstances, it would be folly on our part to disregard or to upset the policy the Board has applied

[20] See, *e. g.*, *Chrysler Corporation*, 44 N. L. R. B. 881; *Budd Wheel Co.*, 52 N. L. R. B. 666; *Dravo Corporation*, 52 N. L. R. B. 322. See also National Labor Relations Board, Seventh Annual Report (1943), p. 63; Eighth Annual Report (1944), p. 57.

in this case.[21] Since the Board's order is in accord with the law and has substantial roots in the evidence, it should have been enforced by the Circuit Court of Appeals. Respondent's objections to the language and scope of the order are either without merit or have been removed by the demilitarization of the guards. And any issues concerning the subsequent deputization of the guards as policemen are answered by our decision in *Labor Board* v. *Jones & Laughlin Steel Corp.*, *post*, p. —. The judgment below is accordingly

Reversed.

THE CHIEF JUSTICE, MR. JUSTICE FRANKFURTER and MR. JUSTICE JACKSON dissent substantially for the reasons set forth in the opinion of the court below, 155 F. 2d 567.

[21] In adopting the War Labor Disputes Act, 57 Stat. 163, Congress provided in § 7 (a) (2) that all actions of the National War Labor Board must conform to the provisions of the National Labor Relations Act—an indication that Congress deemed the preservation of the right to collective bargaining to be essential in war industries.